# Central Law Journal.

St. Louis, Mo., September 2, 1921.


## WHEN A SUBSCRIPTION TO A CHARITABLE ENTERPRISE IS ENFORCEABLE.

The recent case of Scott v. Triggs, 131 N. E. 415 (Ind.) raises the question whether a subscription to a charity is enforceable. It held that such a subscription is enforceable if relied upon by those in charge of the fund to which the subscription is made.

In that case defendant signed a subscription to the Huntington County (Ind.) War Chest, a fund collected by the citizens of Huntington County, Ind., to be distributed to the various war charities in discharge of the quotas for which the county was morally obligated as a community. Defendant failed to pay his subscription and the court gave judgment against him on the ground that "the association, relying on the pledge so made by the appellant and on the pledges made by others, incurred various expenses and obligations for the purpose of carrying out the objects of the association, which obligations have not all been paid by the association, but that a portion of said obligations are now due and owing."

So long as a consideration is necessary to sustain a contract under the English common law, a subscription can never be regarded as anything but an offer. This result shows the absurdity of the common law rule requiring a consideration to support a promise, and in this case as in many other cases the courts have been diligent to to find ways of escape from such an unjust condition. In every system of jurisprudence on the continent of Europe, a promise is good irrespective of the fact that the promissor reaps a benefit or the promisee suffers a detriment. And this is true in English law in the case of specialties. As Dean Ames, of Harvard, has pointed out, a sealed instrument was valid without a consideration, not because the seal imported a consideration, but simply because a promise attested by one's seal created an obligation based on such promise. A written contract today is, in most states where seals have been abolished, as solemn a proceeding as the execution of a sealed instrument at the early common law, and any man who solemnly binds himself to pay a sum of money or perform an act ought not to escape performance by showing lack of consideration. If his promise requires the performance of an act by the other party or the prior or continued existence of some article or status, such requirements should more properly be regarded as conditions, either precedent or subsequent as the case may be.

In the case of a subscription to a charitable enterprise, the promissor engages to pay a sum of money on a date certain in aid of a particular purpose. The fact that others are interested in the same enterprise and that one subscription is made on the faith of another, is hardly a consideration for the promise of any one subscriber. It might possibly be a condition express or implied. I might agree to contribute $200 provided a sum of $10,000 is raised by similar subscriptions. In such case no subscription would be binding until subscriptions amounting to $10,000 had been received at which moment all subscriptions would become binding.

Where no conditions are attached to the subscriptions they become binding under the common law just like other offers to induce the performance of an act, namely, by the performance of the act.

It is almost impossible to draw up a subscription contract that will be binding until the promisee starts upon the performance of the task for the accomplishment of which the subscription was made. Until that moment the contract is unilateral and unenforceable. Twenty-third Street Baptist Church v. Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807; Philips Limerick Academy v. Davis, 11 Mass. 113, 6 Am. Dec. 162; Johnson v. Otterbein University, 41 Ohio State. 527.

Logically, the act called for by a unilateral promise should be completed before the promisor is bound, but in the case of subscriptions it is generally held that if work has been done or money expended in reliance upon the subscription being paid, such entry upon performance constitutes an acceptance of the contract and furnishes the consideration to make the subscription a binding obligation.

The objection is made to this rule that it is theoretically fallacious in the reasoning on which it is based. If I agree to give A one dollar if he will cut the grass on my lawn, A is not entitled to the compensation until he has cut over the grass on the entire lawn. A few strokes of the sickle would not entitle him to bring suit for the dollar which I promised him. But the case of a subscription is different. The money I promise is not compensation to the promisee for services to be rendered but is the *instrument* by which such services are rendered. So when the promisees have bound themselves to carry out the object of the subscription contract, the promisor is bound at once to supply the promisee with the means of carrying into execution the act called for by the subscriber's promise.

The courts have reached a right result simply by acting on their sense of justice, so the Supreme Court of Ohio admitted in the case of Irwin v. Lombard University, 56 Oh. St. 9, 22, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239. In that case the court felt compelled to admit that "it is not unlikely that some of the cases in which subscriptions have been enforced at law, have been border cases, distinguished by slight circumstances from agreements held void for a want of consideration."

The confusion into which some of the courts have fallen, is due to the fact that they have regarded the subscriber's promise as an offer to pay for the accomplishment of a charitable purpose, when clearly the promise is to furnish the means for the performance of an act, desired by the promisor. The offer in such cases is virtually this: "If you will undertake to build a church or a school, etc., I will give you $200 to enable you to complete the enterprise." Here the act called for is not the completion of the enterprise but the assumption of an obligation to complete it. When the promisees assume obligations to perform the task called for, they have performed the act required by the promisor who is now bound to furnish the means to carry on the task he desired the promisees to undertake.

## NOTES OF IMPORTANT DECISIONS

**LIABILITY OF BANK FOR WRONGDOING OF DEPOSITOR'S AGENT WHERE PASS-BOOK BALANCE IS CHECKED BY SAID AGENT.**—Some courts have applied too strictly the rule of estoppel arising in favor of a bank with respect to a depositor's examination of the periodical statements furnished by the bank, where such statement is checked by the agent of the depositor.

It is undoubtedly true that knowledge of a dishonest agent of fraudulent entries and incorrect balance is equally the knowledge of his principal, with the qualification, however, that the principal is chargeable, not with the knowledge of wrongdoing the agent possessed from the fact that he himself was dishonest, but with knowledge of such facts as an honest agent, unaware of the wrongdoing, would acquire when examining the statements within the scope of his employment. The dishonesty of the agent does not change his relationship to his principal, and accordingly does not change the rule charging his principal with knowledge of such facts. Dana v. National Bank of Republic, 132 Mass. 156; First National Bank v. Allen, 100 Ala. 476, 40 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80; Critten v. Chemical National Bank, 171 N. Y. 219, 63 N. E. 973, 57 L. R. A. 529; Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811.

But this rule does not apply to instances of wrongdoing on the part of the agent which are distinctly contrary to the agent's powers where the authority of such agent is filed in writing with the bank. First National Bank v. Farrell, 272 Fed. Rep. 371. In this case Farrell, the plaintiff, opened an account with the First National Bank of Philadelphia and authorized the bank to honor the checks of his agent, Snyder, up to an amount not in excess of one thousand

dollars. He also authorized the agent to check and accept the bank's periodical statements. The agent drew and cashed many checks for his own use in amounts in excess of one thousand dollars before his rascality was discovered. This suit is brought to recover from the bank the amounts in excess of $1,000 which plaintiff's agent drew upon and cashed at defendant's bank. To the contention of the defendant that plaintiff was bound by the periodical statements submitted by his request to his agent, the Circuit Court of Appeals (3rd Cir.) said.

"The general rule arising from the examination of pass book or statements by the depositor himself, and the variation of the rule arising from the examination of them by his authorized agent, involve in practically every reported instance wrongdoing where the negligence of the bank was not involved and where the wrongful act was entirely that of a person other than the bank. Both the rule and its variations disappear altogether where the bank has been negligent in detecting the fraud; National Dredging Co. v. Farmers' Bank, 6 Pennewill (Del.) 580, 69 Atl. 607, 16 L. R. A. (N. S.) 593, 130 Am. St. Rep. 158; Manufacturers' National Bank v. Barnes, 65 Ill. 69, 72, 16 Am. Rep. 576; Myers v. Southwestern National Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672; when the neglect of the bank to observe the limitation of a drawing power was, as here, the primary and proximate cause of the loss; and particularly where, as here, the wrongful act (in the sense of conduct beyond the scope of its authority) was the act of the bank itself, but for which the criminal act of the trusted agent could not have been carried into execution. In honoring checks beyond the authority granted it by the depositors' power of attorney—a document in its possession—the bank in this case knew, or was charged with knowledge of, its own unlawful conduct. The depositors' failure personally to examine the periodical statements and promptly to acquaint the bank with its own wrongdoing misled the bank in nothing. Therefore the law did not impose upon depositors in this case the duty to check up a pass book or examine monthly statements to prevent the defendant bank from continuing its own wrongful conduct."

## A GOVERNOR CANNOT BE LAWFULLY ARRESTED OR PUT UPON TRIAL WHILE IN OFFICE.

A Governor cannot be arrested and put upon trial for a supposed criminal offense, whether committed before or after he took office, without an encroachment of the Judiciary upon the Executive Department. We adhere to our position that this principle is well settled upon the principle and by authority, notwithstanding the criticism and comment of Professor Henry W. Ballantine, published in the CENTRAL LAW JOURNAL of August 19, 1921. His comments prove the slight investigation he has made of the authorities and the unsoundness of his position. The drift of his comment is characterized by Professor Burgess of Columbia University, a distinguished authority on Political Science and Constitutional Law, in volume 2, page 245, in these words:

"Democratic doctrinaires have tried to make it appear that such privileges can only spring from the monarchic principle that the 'King can do no wrong'; *but their argumentation is a tissue of sophistry.* All states have found it necessary to recognize the complete personal independence of the executive head of the government, and some of them have founded it upon the doctrine that the 'King can do no wrong.' But there is another and deeper principle than that of the immaculate character of the king, upon which both the monarchic doctrine and the republican doctrine of the executive independence rest, viz: the necessary order of authority in every political organization."

It is admitted by Professor Ballantine that no Court can enjoin the Governor or mandate him, or prohibit him with respect to the performance of executive duties. That admission is a practical concession of the soundness of our position. The Constitution of Illinois vests in the Governor supreme executive power. It commands him to "take care that the laws be faithfully executed," and requires him to take an oath to support the Constitution. He is, therefore, vested with the duty of determining when the powers of the executive office are about to be invaded by the action of the Judiciary and he alone is authorized to determine that question.

In the case of People v. Bissell,[1] the Supreme Court of Illinois disclaimed the right to directly determine the limits of executive power and authority which may not be passed by the Judiciary and held that the Judiciary can only determine that question when it arises in suits to which the Governor is not a party, and said:

"When final action upon any subject is confided to either of the other departments, there the responsibility must rest of conforming such action to the law and the constitution." (The People ex. rel. v. Bissell, 19 Ill. 231; People v. Dunne, 258 Ill. 449. See also ex parte Moore, 64 N. C. 802; Ex parte Kerr, 64 N. C. 816; State v. Shields, 272 Mo. 342.)

Governor Small, upon full investigation and the advice of counsel, has determined that he would violate the provisions of the Constitution requiring him to take care that the law be faithfully executed and to uphold the constitution, if he should consent to his arrest and incarceration, or to being placed upon trial upon a criminal charge for the reason that such procedure would obviously suspend the operation of executive government, which he alone can personally function. This makes it his duty to oppose the effort of the courts to encroach upon his department. Therefore, if a Court can determine otherwise and coerce him to observe its process that would, as said by the Supreme Court of Missouri," make the judges the interpreters of the will of the executive and the independence of the executive department as a co-ordinate branch of government would be virtually destroyed."[2]

Professor Ballantine cites the case of Ekern v. McGovern,[3] and quotes therefrom in support of his position. That case holds, contrary to the weight of authority and the decisions of the Supreme Court of Illinois, that a Governor is subject to the process of the courts to coerce or restrain him in the performance of an official duty.[4]

In the case of People v. Dunne, Justice Cartwright, construing the constitution and speaking for the court, said:

"By section 6 of article 5, the supreme executive power of the government is vested in the Governor. In the great majority of jurisdictions it is held that in view of the division of the powers of government, there is no power on the part of the courts to enforce by *mandamus* the performance of any duty, whether discretionary or ministerial, imposed upon the chief executive by virtue of his office. (26 Cyc. 230; 6 Am. & Eng. Ency. of Law, — 2d ed., — 1017.) All authorities class this state with the majority as holding that doctrine. The independence of the judicial department and its freedom from interference by the other departments has been maintained. (Rockhold v. Canton Masonic Mutual Benevolent Society, 129 Ill. 440; In re Day, 181 id. 73; Witter v. Cook County Commrs., 256 id. 616.) Of course, it would be expected that the court enforcing the provision of the constitution by which the powers of government are partitioned among the several departments, for its own protection from interference would accord the same degree of independence to the other departments. We shall see with what scrupulous care this has been done."

Reference to the classifications of authorities in Cyc. and Am. & Eng. Ency. of Law will disclose that the Supreme Court of Wisconsin is with the minority on this question and that its decision is in direct conflict with that of the Supreme Court of Illinois. Moreover, the fallacy of its position is shown by the quotation in Professor Ballantine's comments. Referring to the possibility of executive resistance to the process of the court, it is said:

"This court has never yet acknowledged the existence of either the want of power to enforce its writs, or want of courage to vindicate it."

This is high sounding phrase, but its fallacy exists in the fact that the Governor is a chief executive, bound by oath of office to take care that the law be faithfully executed and to support the constitution of the state. Should the Court coerce him against his judgment and will in a matter relating to the performance of his duties under the constitution or law, as it so boastfully threatened, it would plainly substitute the judgment and will of the supreme judiciary for that of the supreme executive department contrary to the express commitment of au-

(1) 19 Ill. 231.

(2) State v. Shields, 272 Mo. 342; State v. Fletcher, 39 Mo. 508.

(3) 142 N. W. 595, 46 L. R. A. (N. S.) 795.

(4) People v. Dunne, 258 Ill. 441.

thority by the constitution and destroy and overthrow the executive department.

The Court was equally in error in holding that any construction of the constitution by the Governor not in harmony with that of the Court would be a violation of the law. What right has the court under a constitution to construe the constitution for its Governor and require him to accept its will? It was further said:

"The military would be in duty bound to disregard the illegal command of the Governor, if he should order them to use physical force against the sheriff."

This was an invitation to the militia to construe the constitution and determine whether an order of its commander-in-chief was lawful, and, in effect, invited insubordination of the militia when called upon to execute the law in accordance with the judgment and will of the executive. It requires no legal acumen to see that such a principle would be destructive of republican government and it can have no support from any person who prefers orderly government to anarchy.

The direct statement that a Governor, the supreme executive, has no authority to restrain the sheriff, an inferior of his department, from doing what in his judgment is in violation of the constitution is a fallacy too patent for acceptance by any unbiased mind in the habit of considering legal questions, and it is equally clear that that was not a question within the jurisdiction of the courts of Wisconsin.

It is further said:

"As commander of the militia, he (the Governor) has no right to use the military force of the state to defy the officers of the law. The military would be in duty bound to disregard the illegal command of the Governor if he should order them to use physical force against the sheriff."

This position places the Supreme Court of Wisconsin in the strange attitude not only of assuming that the Governor could not exercise honest judgment in conflict with the views of the Court, but also arrogates to the Court the exclusive right to determine what are and what are not lawful duties of the Governor under the constitution, contrary to all other authorities on that subject, and to determine for the Governor when he may or may not use the militia in protection of executive authority, although every other court that has spoken on that subject has held that when the Governor acts as commander-in-chief of the militia, his action cannot be questioned by any authority or in any place.[5]

The language, "No man in the country is so high that he is above the law, no officer of the law may set the law at defiance with impunity," quoted from United States v. Lee,[6] is not in conflict with the views of Governor Small's counsel, nor the weight of authority. We have never contended that he has, nor does he claim, a *personal exemption* from arrest and trial for a supposed criminal offense committed either while in office or before he took office, but that to arrest him and put him upon trial while in office would be to practically, either temporarily or permanently, depose the Chief Executive, cause a suspension of executive functions and thereby inevitably encroach upon the executive department. We insist this is true, both as a matter of fact and as a principle of law. It results from the impossibility of separating the person of a Governor from the office in which he functions. So long as he holds the office it is ever with him. As President Jefferson said in the Burr case, in declining to obey a subpoena sent to him by Chief Justice John Marshall: "To comply with such calls would leave the Nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary that it is the only branch which the Constitution requires to be always in function."

It is true, as advanced by Professor Ballantine, that section 3, article 7 of the Constitution of Illinois, exempts from arrest electors during their attendance upon elec-

(5) Ex parte Moore, 64 N. C. 802; Ex parte Kerr, 64 N. C. 816.

(6) 106 U. S. 196.

tions and in going to and returning from the same, except for treason, felony or breach of the peace. And, it is also true that a like exemption exists in favor of senators and representatives during the sessions of the General Assembly, and in going to and returning from the same. But that does not argue that the absence of a like provision in relation to the Governor supplies a basis for the contention that he has no such exemption.

The Governor is a branch of the legislative department. It is his duty to pass upon all legislative bills and either approve or disapprove of them. Would Professor Ballantine have us believe that the framers of our constitution thought it necessary to provide such immunity for the senators and representatives and proper to leave it in the power of the courts at will to take the Governor from the performance of much more important legislative duties than can possibly devolve upon them when he is passing upon the acts of a legislative session? Would that not be a strange inconsistency to be found in so important a document as a State Constitution? Is not the absence of a constitutional provision privileging the Governor from arrest clear demonstration that the framers of the constitution understood that he would not at any time be subject to arrest without such express exemption?

A very large number of cases have arisen in which this question has been incidentally discussed, but we are not aware that it has ever before directly arisen in any court of this country. The principle for which we contend seems to have always been conceded upon fundamental principles deduced from the nature of the office and the evident impossibility of separating the person of a chief executive from the chief executive function.

In a case where the acts of the President of the United States as Commander-in-Chief of the Army were questioned by a suit against him, quoting from Chief Justice Marshall in an earlier case, Chief Justice Chase of the Supreme Court of the United States, aptly described a similar contention as that of Professor Ballantine as "an absurd and excessive extravagance," and said:

"It was admitted on the argument that the application now made to us is without precedent; and this is of much weight against it. Had it been supposed at the bar that this court would in any case interpose by injunction to prevent the execution of an unconstitutional act of congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it. * * * The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained."[7]

In the case of State v. Holden,[8] in which it was sought to have a bench warrant issued for the arrest of the Governor and prosecute him for an alleged criminal act committed while acting as commander-in-chief of the militia, it was said:

"The learned counsel were unable to show any precedent which would sustain application of affiant and this fact goes far in showing no such judicial power exists."

So, that there are no decided cases where this question has been directly involved argues that the courts have heretofore declined to attempt to coerce a Chief Executive rather than that no such case has arisen, or that the law is contrary to the opinion expressed by Governor Small's counsel. Where, nevertheless, the question has arisen, it has been uniformly held that the Governor cannot be arrested or coerced by judicial process; and the exemption has been put upon the broad ground that the person of the Chief Executive and his office are so inseparable that his personal liberty cannot be restricted or his right to go where he will and do what he will impaired without also encroaching upon the executive office, and destroying its free and independent exercise by the Governor.

If arrested, the Governor might be put in jail, and if put upon trial he would be com-

(7) Mississippi v. Johnson, (U. S.) 4 Wall. 475-502.

(8) 64 N. C. 829.

pelled to remain personally in court during his trial, though it might consume months. If subject to arrest and trial for an offense alleged to have been committed before he took office, he may also be arrested and put upon trial for an offense alleged to have been committed while in office—even for an alleged malfeasance or misfeasance in office or palpable omission of any duty of office,[9] for the section of the Constitution in relation to a judgment of impeachment only removes the officer impeached from office and disqualifies him to thereafter hold office, and provides:

"The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment and punishment according to law."

If he can be thus prosecuted during his term of office for treason or felony, he may be put upon trial for the most insignificant misdemeanor, at the will of the most insignificant and irresponsible court. If he can be prosecuted on a criminal charge at all, he would have no right to choose the time of his arrest or trial, hence his arrest or trial might suspend or defeat performance of the most important public duties that may devolve upon a Governor. These vital facts and fundamental principles are ignored by the doctrinaires followed by Professor Ballantine, but cannot be ignored with hope of reaching a correct conclusion.

The authorities are conclusive in support of the opinion given to Governor Small. In every case where the question of coercing or arresting a Governor has been considered, it has been held that his office is immune from interference and that he cannot be personally arrested or put in duress without an encroachment upon the functions of the Executive Department, except in Wisconsin, and, we submit, that no sound lawyer on reflection can give unbiased support to the Ekern case. The immunity from prosecution and imprisonment has always been put upon the high ground of the public welfare and the safety of the chief executive office from interference by court procedure which might result in the arrest or coercion of the Governor.

Professor Burgess of Columbia University, an eminent text-writer on Constitutional Law, speaking of the immunity of the President from arrest, says:

"He is privileged from the jurisdiction of any court, magistrate or body over his person. He cannot be arrested or restrained of his personal liberty by *anybody*, or *anything*, not even for the commission of murder. He is responsible to one body only, *viz:* The Senate of the United States, organized as a court of impeachment under the presidency of the Chief Justice of the United States. * * *

"There is no danger to the people in this principle. There would be great and constant danger in the opposite theory. Under the opposite theory, any magistrate might, at the instigation of any individual, cause interregnum or a devolution of the presidential office, thus defeating the will of the whole people in the choice of the President, and exposing the whole people to the danger of anarchy. Moreover, as I have said, the principle only suspends the liability of the President to process. *Upon his descent from office he becomes immediately liable to prosecution for every crime and misdemeanor committed while in office.*"[10]

Professor James Albert Woodburn of Indiana University, in his recent work on *The American Republic,* quotes Professor Burgess with approval and adds:

"This exemption from process of the courts is only temporary, the right of prosecution is only suspended. Upon his retirement or removal from office, the ex-president becomes immediately liable to prosecution and punishment for every crime committed while in office."

In the case of People v. Dunne, *supra,* it was said:

"The duty or power committed to one branch of the government for its exercise by the constitution is not subject to interference, control or dictation by another branch;"

and approval was given to the separate opinion of Justice Breese in the Bissell case in these words:

(9) Sec. 208 Criminal Code.

(10) 2 Burgess Political Science and Constitutional Law, 245.

"It was said that the court had no control over Gov. Bissell to perform any duty, and that in matters of public duty the court committed him to the high tribunal of his own conscience and the public judgment."

The rule we invoke was correctly stated as long ago as the time of Lord Mansfield, not in relation to the King, but the Governor of the Island of Minorca. In Fabregas v. Mostyn,[11] he said:

*"No criminal prosecution lies against a Governor and no civil action lies against him because what would be the consequence.* Why, if a civil action lies against him and a judgment obtained for damages, he might be taken up and put in prison on a capias, and therefore, locally during the time of his government the court in the Island cannot hold plea against him."

In State v. Holden (Governor),[12] a criminal prosecution in which a bench warrant was sought for the Governor's arrest, it was said:

"The government was formed for the benefit of all the citizens of the state, and it would be of little force and efficiency if the Governor (in whom is vested the supreme executive power of the state) could be arrested, and thus virtually deposed by a warrant from the Judiciary issued upon the application of an individual citizen, for alleged excess of authority, the performance of what the Governor may consider his executive functions."

The constitutions of North Carolina and Illinois both provide that impeachment shall not exempt the officer impeached from prosecution, trial and judgment for any criminal offense committed while in office, so the rule is the same whether the charge is one of offense committed before or after the person took office.

In the case of Appeal of Hartrauft, Governor,[13] it was held that the Governor could not be made subject to a decree in chancery, because it could not be enforced except by attachment, and the Governor could not be lawfully taken on attachment. The same rule was applied in Thompson v. German Valley R. Co.[14] In the case of State v. Frazier, 114 Tenn. 519, it was said that if appointed or named on a board it would be optional with the Governor as to whether he would serve, and discussing his independence under the Constitution, said:

*"No court can coerce him. No court can imprison him for failing to perform any act, or to obey any mandate of any court."*

In the case of Rice v. Draper,[15] a petition for mandamus against the Governor was applied for. The Supreme Court of Massachusetts said:

"An order under a writ of mandamus against the Governor, if he should refuse to obey it, might present a strange spectacle of a direction by the court to the executive forces of the government to coerce and punish the chief executive officer of the state who commands and controls the military forces that are ultimately relied upon for the maintenance of the law. * * * The Governor shall answer to his own conscience, to the people who selected him, and in case of possible commission of high crimes or misdemeanors to a court of impeachment."

In the case of People v. Morton,[16] the New York Court of Appeals said:

"The only way in which mandamus may be enforced is by commitment of the party who refuses its command, as for contempt. But the courts have no power to commit the Governor for a contempt. They have no power over his person. He may be impeached, but there is no other way in which he may be deprived of his executive office."[17]

The arrest or prosecution of the Governor of Illinois would leave the state government without an executive head. The duties of his office are all personal and can be performed by no other person as his proxy or agent. There is no constitutional provision which would devolve the office upon any one else in such case. Section 17 of article 5 only authorizes the Lieutenant Governor to exercise the office in case of the death, conviction on impeachment, failure to qualify,

(11) 1 Cowper 161.
(12) 64 N. C. 829.
(13) 82 Pa. St. 433.
(14) 22 N. J. Eq. 111.
(15) 207 Mass. 577, 32 L. R. A. (N. S.) 355.
(16) 41 L. R. A. 331.
(17) See also Major v. Shields, 272 Mo. 342; United States v. Clayton, Fed. Case 14814; Hovey, Governor v. State, 217 Ind. 588; State v. Fletcher, 39 Mo. 508; State v. Stone, 120 Miss. 438.

resignation, absence from the state, or other disability. The other disability referred to must be personal to the Governor and under the doctrine *ejusdem generis* can only relate to such disability as is indicated by the words, "death," "conviction on impeachment," "failure to qualify," resignation," or "absence from the state," in either of which absence of the power to function is complete and either temporary or permanent. There is no provision under which it could be argued that the arrest and trial of the Governor upon a criminal charge, or even his conviction, would vacate his office. While conviction for embezzlement would disqualify him to hold office, he would still remain in office until divested by a court procedure or by impeachment.

These authorities are all based upon the single proposition that because of the absolute identity of the person of the Governor with his office and the physical inability to coerce, imprison or put a Governor upon trial for a supposed criminal offense without interfering with the functions of the executive department and depriving the state of the executive head, the governor is exempt from arrest during his term of office, but it is everywhere recognized that he is not above the law, but subject to it and can only be punished in accordance with it after his person is lawfully separated from the chief executive office.

As said by the Supreme Court of Missouri in the Major case:

"The Governor's duty devolves on him by law under a higher authority than the order of a court, *i. e.*, the mandate of the constitution. The duties thus conferred are political, and his acts are entirely independent of the judiciary and for a failure to perform which he is responsible to the people alone. . . "

Those who so loudly proclaim that the Governor should be subject to the Courts merely attempt to subordinate the executive to the judicial departments and make the judge the supreme authority, not only over his department, but over the executive department as well.

The absurd and vicious consequences of the contrary doctrine applied under the Constitution of Illinois appear in these considerations:

(1) In directing process for the arrest of the Governor after he had honestly determined that to submit to the jurisdiction of the court would violate his duties and oath of office was an effort to displace the will and judgment of the Chief Executive in relation to an executive duty with the will and judgment of the court, and an endeavor to coerce the chief of the executive department, in violation of the Constitution.

(2) If arrested or tried, during arrest or trial, the functions of the executive office will be suspended and the government of the state would be without a head.

(3) If convicted, the Governor would have the power to immediately pardon himself, as his conviction would not suspend the pardoning power which rests with him alone.

(4) The Constitution creates the Governor the supreme executive officer of the state, and in arresting him, a subordinate officer of his department, the sheriff, coerced him to imprisonment on the command of a co-ordinate branch of the government, the judiciary, thereby suspending the continuous functioning of the executive department in violation of the Constitution.[18]

(5) The Governor, as commander-in-chief of the militia, is vested with power, not only to call out the militia at will, but to determine for himself when to do so, and what shall be done in obedience to the command of the Constitution to take care that the laws be faithfully executed and to support the constitution; and his acts in accordance with his judgment as to when and how he shall exercise that power cannot be questioned in any place or by any person, except for a willful, that is, a knowingly and purposely committed violation of the Constitution.[19]

(18) Burr case.

(19) In re Moore, 64 N. C. 802; In re Kerr, 64 N. C. 816; People v. Dunne, 258 Ill. 441; People v. Bissel, 19 Ill. 229.

(6) If a court may determine that the Governor is acting willfully in construing the Constitution to require him to protect the Executive Department against invasion by the Judiciary and coerce the Governor, the Governor has an equal right to determine that the court is corruptly and willfully violating the Constitution in ordering his arrest and may use the militia to coerce the court, or may, when the court makes a decision which does not accord with the views of the Governor, arrest and imprison the judge, because the executive and judicial departments are upon an exact equality with respect to a construction by either of the powers and duties of the other under the Constitution.[20]

(7) If the Governor can be arrested and put upon trial for an alleged criminal act committed before he was elected, or for an act not involving a malfeasance, misfeasance, high crime or misdemeanor in office, for which he might be impeached, he can, upon the complaint of any private citizen, be arrested and put upon trial for an act of misconduct in office or the most insignificant misdemeanor upon the command of the most insignificant court, or even by a constable without a warrant for a violation of the law which has, in fact, been committed if the constable has reasonable grounds to believe the Governor committed it.[21]

It is so apparent that the application of these principles would completely overthrow and destroy the Executive Department and produce anarchy that it would be truly surprising if any unbiased court should sustain the contention of those who insist that a Governor may be arrested and prosecuted for an alleged criminal offense while in office.

GEO. B. GILLESPIE.

Springfield, Ill.

(20) People v. Dunne, supra.

(21) Crim. Code, 2 J. & A. Ill. S. Am., § 4027, p. 2187.

## INNKEEPERS—LIABILITY TO GUESTS.

### FREWEN v. PAGE.

Supreme Judicial Court of Massachusetts, Suffolk. May 31, 1921.

131 N. E. 475.

Where a hotel proprietor invaded the room of guests and ordered them to leave the hotel, and assaulted, falsely imprisoned and slandered the guests, damages might be assessed for humiliation and injury to the guests' feelings, as well as for the unwarranted disturbance of their right of privacy and exclusive use of the room, and such acts were not justified, though they arose from some mistake made by him or his agents in his records.

BRALEY, J. The only reference to the evidence in the record is the "statement of facts," from which it appears that the plaintiffs, who are husband and wife, were accepted as guests at the Hotel Langham, managed and kept by the defendant George H. Page, and the question whether they had been properly registered, as required by St. 1918, c. 259, § 5, has been answered in the affirmative by the jury. A finding would have been warranted that while in bed in a room assigned to them, to which they had been escorted and given a key, three employees of the defendant entered, followed by the defendant with a police officer, and although ordered to leave the hotel, the plaintiffs refused compliance with the order, and that evidence was offered "of an assault, of false imprisonment, and slander, all incidental to the plaintiffs' right to the quiet enjoyment of their room, but the defendant offered evidence to dispute this." We assume that this summary refers to what took place after the defendant came in and that the jury could find he acted as the proprietor, in control of the hotel, and the employees and police officer were present at his direction and solicitation.

The action is in tort or contract. But at the plaintiffs' election by order of the court on motion of the defendant, the cases were submitted to the jury on the counts in contract, and general verdicts were returned for the plaintiffs. The jury having specially found that the plaintiffs had duly registered, they were rightly in occupation. The defendant's fifth and sixth requests, that if the defendants were violating the law in occupying a room without having been properly registered "that are precluded from recovering for any injury suffered while in the room," and the defendant was "justified in entering the room for the purpose of learning whether the law had been complied with,

and, if the occupants refused to assist him, he is justified in assuming that their presence is unlawful, and can use any reasonable means to remove them," are no longer material. See St. 1918, c. 259, § 5.

The questions raised by the seventh request, whether the defendant was "responsible for the acts of the police officer done by the police officer while in the performance of his lawful duty," and "that the police officer was acting within the scope of his lawful duty in entering the room * * * to investigate into the right of their presence there," were for the jury under suitable instructions. Mason v. Jacot, 235 Mass. 521, 127 N. E. 331.

The eighth request, that if the defendant had no intention of frightening the plaintiffs, but merely went to the room to ascertain whether they "had a right to be there," he is not responsible "for her fright, or the consequent injury to her health," is not supported by any legal presumption. The defendant was not justified in assuming the plaintiffs were not registered. The hotel registry disclosed their names, and he could not for this reason intrude upon their privacy. Sampson v. Henry, 11 Pick. 379, 387. It is necessary, however, to ascertain the respective rights of the parties upon which the defendant's remaining requests must rest. The defendant urges that consequential damages for breach of contract are limited to such damages as were within the contemplation of the parties at the time of entering into the agreement. But it was held in Dickinson v. Winchester, 4 Cush. 114, 121 (50 Am. Dec. 760), that a plaintiff who had lost a trunk and its contents while a guest at the defendant's hotel could declare in case of assumpsit.

"The plaintiff may set forth a duty, and aver a fact in violation of it as a tort, or aver an implied promise to perform it, and a failure to perform that promise." Vannah v. Hart Private Hospital, 228 Mass. 132, 117 N. E. 328, L. R. A. 1918A, 1157; Norcross v. Norcross, 53 Me. 163.

The contract was not merely for the use of the room and entertainment, but for immunity from rudeness, personal abuse and unjustifiable interference, whether exerted by the defendant or his servants, or those under his control, or acting under his orders. The plaintiffs, having duly registered and been put in possession of a room for their exclusive use, had the right of occupation for all lawful purposes until vacated, subject only to the access of the defendant at reasonable times, and in a proper manner, for such purposes as might be necessary in the general management of the hotel, or upon the happening of some unanticipated, controlling emergency. Com. v. Power, 7 Metc. 596, 601, 41 Am. Dec. 465; Holden v. Carraher, 195 Mass. 392, 81 N. E. 261, 11 Ann. Cas. 724; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969; Lehnen v. Hines, 88 Kan. 58, 127 Pac. 612, 42 L. R. A. (N. S.) 830.

If without any sufficient reason appearing in the record, the defendant, who is not shown to have given any previous notice, or made any request for their departure, entered the room for the purpose of compelling them to vacate, he is liable in damages if excessive force, or coercion, or intimidation was used, or his conduct towards the plaintiffs was abusive, insulting, and wanting in ordinary respect and decency. And his tenth request, that if as owner of the hotel he entered the room "for the purpose of inspecting the same and seeing that the rules of the hotel, and all statutory regulations were complied with, then he was acting within the scope of his legal right and was not a trespasser," is not supported by the record. The judge's instructions are not stated, and it must be inferred as against the excepting party that they were correct and sufficient. Khron v. Brock, 144 Mass. 516, 519, 11 N. E. 748. The jury could find that after entering the room he engaged in the wrongful acts charged without justification or excuse. See Holden v. Carraher, 195 Mass. 392, 81 N. E. 261, 11 Ann. Cas. 724. The general law is well settled. The guest is entitled to respectful and considerate treatment at the hands of the innkeeper and his employees and servants, and this right created an implied obligation that neither the innkeeper nor his servants will abuse or insult the guest, or engage in any conduct or speech which may unreasonably subject him to physical discomfort, or distress of mind, or imperil his safety. Lehnen v. Hines, 88 Kan. 58, 127 Pac. 612, 42 L. R. A. (N. S.) 830; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969; Morningstar v. Lafayette Hotel Co., 211 N. Y. 465, 105 N. E. 656, 52 L. R. A. (N. S.) 940; McHugh v. Schlosser, 159 Pa. 480, 28 Atl. 291, 23 L. R. A. 514, 39 Am. St. Rep. 699; 13 R. C. L. Innkeepers, § 11 and notes. And he can recover damages for injury to his feelings resulting from the humiliation to which he has been subjected. Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. (N. S.) 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682; Aaron v. Ward, 203 N. Y. 351, 96 N. E. 736, 38 L. R. A. (N. S.) 204; Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503; De Wolf v. Ford, 193 N. Y. 397, 401, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am.

St. Rep. 969; Head v. Georgia Pacific Railroad, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. The plaintiffs are not shown to have annoyed or disturbed other guests, or to have improperly demeaned themselves, or to have violated any rules of the hotel, and under suitable instructions the jury on conflicting evidence could find the defendant had been guilty of assault, false imprisonment and slander, by "words spoken * * * imputing crime."

It follows that the plaintiff's four requests, that if they were unlawfully restrained of their liberty, the defendant is liable in damages, and if he incited, encouraged, or countenanced the presence and acts of the officer he is liable therefor, and that damages may be assessed for humiliation and injury to the plaintiff's feelings, as well as for unwarranted disturbance of his right of privacy and exclusive use of the room for himself and wife, and that even if the entry of the defendant arose from some mistake made by him or his agents "in his records," such mistake would not amount to a justification, were unexceptionable. The defendant's ninth request, that if the plaintiff suffered no physical injury, "she cannot recover for mental suffering," was properly denied. As we have said, he could not treat the plaintiffs with contumely by the use of insolent language concerning them, specifically set forth in the declaration, and referred to, and characterized in the record as "slander," which the jury could say caused the plaintiffs not only physical annoyance and discomfort, but also worry and distress of mind. De Wolf v. Ford, 193 N. Y. 397, 401, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969. The defendant's duty in this respect is analogous to that of a common carrier of passengers. Com. v. Power, 7 Metc. 596, 601, 41 Am. Dec. 465; Jackson v. Old Colony Street Railway, 206 Mass. 477, 485, 92 N. E. 725, 30 L. R. A. (N. S.) 1046, 19 Ann. Cas. 615; Gorman v. Southern Pacific Co., 97 Cal. 1, 31 Pac. 1112, 33 Am. St. Rep. 157. In uttering incriminating words in the presence of his servants and the police officer, the defendant violated his contractual obligation to the plaintiffs as guests, of courtesy and respectful treatment, and freedom from humiliation, contempt and ridicule arising from slanderous verbal attacks.

We are therefore of opinion that the cases come within the doctrine of Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311, and kindred decisions, and the plaintiffs can recover in contract, as fully as if they had sued in tort. The final request, that they "could not recover on their counts in contract for any damages resulting from words spoken, the slander, the false imprisonment, assault and battery, or for the humiliation, but could only recover for the value of the room," even when read in connection with the special answers of the jury to questions propounded by the defendant and submitted at his request, is covered by what has been said, and the defendant having failed to show reversible error, the exceptions should be overruled.

So ordered.

NOTE.—*Liability of Innkeeper for Invasion of Guest's Right of Privacy.*—The business of an innkeeper is quasi public, and he is bound to respect the convenience, privacy, safety and comfort of his guests, and to courtesy and respectful treatment. Hurd v. Hotel Astor Co., 182 App. Div. 49, 169 N. Y. Supp. 359.

The right of a guest to the use and possession of his room is subject to such emergent and occasional entries as the innkeeper and his servants may find it necessary to make in the reasonable discharge of their duties. De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527.

In the last cited case the Court said: "As a guest for hire in the inn of the defendants, the plaintiff was entitled to the exclusive and peaceable possession of the room assigned to her, subject only to such proper intrusions by the defendants and their servants as may have been necessary in the regular and orderly conduct of the inn, or under some commanding emergency. But for all other purposes, their occasional or regular entries into the plaintiff's room were subject to the fundamental consideration that it was, for the time being, her room, and that she was entitled to respectful and considerate treatment at their hands. Such treatment necessarily implied an observance by the defendants of the proprieties as to the time and manner of entering the plaintiff's room, and of civil deportment towards her when such an entry was either necessary or proper."

Where the servant of an innkeeper forcibly entered a guest's room, insulted her, etc., the guest may recover either on the theory of a tort or breach of contract. Boyce v. Greeley, Square Hotel Co., 228 N. Y. 106, 126 N. E. 647, affg. 168 N. Y. Supp. 191.

## BOOK REVIEW.

### BERRY ON AUTOMOBILES—THIRD EDITION.

No subject of the law has grown faster in the last few years than the law relating to automobile traffic. To the student of legal history this phenomenon is interesting as he sees passing before his very eyes that which occurred in analogous cases hundreds of years ago. The development of the law merchant, of master and servant, of railroads, of electricity, etc., were in the same way the application of old principles to new situations created by the advancement of commerce, art

and invention, as well as changes in the mode of living. The common law is so elastic that it is able to fit any new situation in society and if the fiction that it constitutes a reservoir of principles to fit every possible situation which it is the duty of the court to discover has been exploded, yet the action of the judges in applying old principles to new situations is not conscious judicial legislation. There is always the attempt on the part of the judges to weave the new law into the warp and woof of the old, so that the law still shall be as it always has been considered to be, one homologous structure.

The law relating to automobiles is the application of principles of negligence, agency and master and servant to the motor-driven vehicle. There have necessarily been some pulling and stretching to make the old principles to fit the new situations, but the variations have not been as great or as numerous as one would be led to suppose.

These reflections have been prompted by examination we have just made of the third edition of Mr. C. P. Berry's work on Automobiles, which has just come from the press. Mr. Berry's second edition was a very good book, but the third edition has been revised so carefully and the scope so greatly enlarged that we are now prepared to say that from the practitioner's standpoint, it is the best work on the subject of automobiles which we have examined.

Besides being entirely rewritten, completely revised and brought up to date, this new edition contains six more chapters than the previous edition, and double the amount of material. The work is exhaustive and complete, covering the whole field of Automobile Law in its entirety. All the new phases of the law, such as Filling Stations, Jitneys, Insurance, etc., have been exhaustively dealt with.

A list of the chapter headings will give some idea of the wide range of the questions discussed in this treatise. They are as follows: 1, Definition and History; 2, Legal Status; 3, State Police Regulations; 4, Municipal or Local Police Regulations; 5, State License Laws; 6, Municipal or Local License Laws; 7, Federal Laws Affecting the Automobile; 8, Rights and Duties on the Highway Generally; 9, Regulation and Licensing—Failure to Comply with Law; 10, Regulatory Terms Defined; 11, Injuries to Pedestrians; 12, Injuries to Persons Boarding and Alighting from Street Cars; 13, Injuries to Children; 14, Injuries to Persons Employed in Streets; 15, Injuries to Occupant of Automobile; 16, Frightening Horses; 17, Collisions with Street Cars; 18, Collisions with Railroads; 19, Collisions Between Automobiles; 20, Collisions of Automobiles with Other Vehicles and with Animals; 21, Injuries from Defective Highways; 22, Measure of Recovery for Damage to Automobile; 23, Evidence of Speed and as to Stopping; 24, The Chauffeur; 25, Liability of Owner When Automobile is Operated by Another; 26, Liability of Owner When Automobile is Operated by Member of Family or Guest; 27, Liability of Owner for Injuries to Chauffeur; 28, The Garage; 29, Filling Stations; 30, The Garage Man and the Repair Man; 31, Sales; 32, The Agent and the Manufacturer; 33, Liability of Manufacturer for Injuries Caused by Defective Automobile; 34, Automobile in Public Service; 35, Violation of Police Regulations and Prosecution Therefor; 36, Insurance.

The feature of the earlier editions maintained in the new is that the classification is according to the facts in each case. The section sub-headings are frequent and subdivide the facts minutely so that it is often possible for an attorney to get a case on "all fours" with his own.

Printed in one large volume of 1625 pages, on very thin paper and bound in a red flexible binding.

## ITEMS OF PROFESSIONAL INTEREST.

### CARNEGIE FOUNDATION BULLETIN ON LEGAL EDUCATION

Announcement is made of the publication, August 27th, of Bulletin Number Fifteen, entitled "Training for the Public Profession of the Law;" subtitle, "Historical Development and Principal Contemporary Problems of Legal Education in the United States, with some Account of Conditions in England and Canada," by Alfred Zantzinger Reed; 469 pages 8 vo. and Index.

This volume is an outcome of a study of legal education and cognate problems, undertaken some years ago at the request of the Committee on Legal Education of the American Bar Association. The Foundation will be glad to distribute copies gratuitously as promptly as labor difficulties permit, on written application to its Division of Educational Enquiry, 522 Fifth Avenue, New York City.

## CORRESPONDENCE.

### COMPETENCY OF COURTS TO DECIDE SCIENTIFIC QUESTIONS

*Editor, Central Law Journal*:

Your issue of August 12th, on page 96, quotes a statement of Dean Roscoe Pound, of Harvard: "There is a growing disposition on the part of every learned profession to question the competency of the lawyer to determine scientific problems." Is it a growing disposition or a known fact?

Relative to resistance of materials the Federal Reporter furnishes ample evidence that the knowledge of the geography of strain possessed by the Federal Judge presents the same lack of precision evidenced by the college freshman's definition of longitude as the distance East and West of the Equator.

The mental dead reckoning of longitude by this definition leaves us somewhere in the regions of nowhere, just as do our court decisions on the engineering phases of the patent case. Thus, in the Third Circuit we have four judges holding that all the engineer does in designing concrete is to put steel in where strains come in defiance of the law of rigidities and least work. We find in the Eighth Circuit a confusion of applied shear force with shear strain. In comparing two cases where the applied forces are the same, in one the shear strain is zero next to the support (proportional to the sum of the moment areas) and in the other a maximum at the support for the same reason because the bending moments are the same sign throughout in the latter case and in the former they are of opposite signs over and between the supports. Yet, the court held that the shear strains were greatest at the support where they are zero and the two cases alike; in other words, that nothing equals something. The maximum shear strain in one case would be about one-fifth as great as in the other and the maximum value which occurs at different places was held by the court to occur at the same place. In the Third Circuit we have the finding that circular and radial strains in all directions are equivalent. The latter measures deflection—the former is related to it about as closely as the distance East or West of the Equator is to longitude.

The expressed amazement of an entire Court of Appeals at the statement that a floor bends or deflects under load disclosed a mental grasp of the subject of resistance of materials far inferior to that possessed years before the Christian Era.

In general the blunders of the Federal Courts on such elementary matters result from heedlessness in the reversal of the deliberate opinion of the trained engineer examiners of the Patent Office upon engineering questions which the examiners are conversant with while the courts as now constituted are not.

Should the builder erect concrete buildings on the pseudo equitable principle enunciated by the 8th C. C. A., i. e., putting the steel in the top of a floor is the plain mechanical equivalent of putting it in the bottom, would not the public insist upon re-enactment of the old Building Code Law of Hamurabi to the effect that, if a builder constructs a house and the work be not firm and it falls and kills the owner thereof, then shall the builder's life be forfeited therefor.

And yet the lawyer would have the layman believe that we now have a practical system for the encouragement of all the scientific arts!

Yours very truly,

C. A. P. TURNER.

Minneapolis, Minn.

## HUMOR OF THE LAW.

"Shay, offisher, wheresh th' corner?"

"You're standing on it."

"'S no wonder I couldn't find it."—*Puppet.*

A judge's little daughter, who had attended her father's court for the first time, was very much interested in the proceedings. After her return home she told her mother.

"Papa made a speech, and several other men made speeches to 12 men who sat all together, and then these 12 men were put in a dark room to be developed."—*Pearson's Weekly, London.*

Early in his career as a lawyer, Chief Justice White was once called upon to defend a man who had stolen a pair of pants. The man was seated with his legs under a large table, when Mr. White sat down and asked him something about the case. The man was most reticent. Finally the lawyer for the other side called the accused to take the stand. The prisoner turned to Mr. White and said:

"Jedge, I don't want to take the stand."

"Why not?" asked Mr. White. "You're perfectly innocent, aren't you?"

"Yes, sir, I'se perfectly innocent as long as I sit with my feet under the table, but if I get up on the stand—oh Lord, Jedge, the trouble is I'se got them pants on!"

## WEEKLY DIGEST.

**Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.*



1. **Attorney and Client**—Disbarment.—A disbarment proceeding is not a prosecution for crime.—San Francisco Bar Ass'n v. Sullivan, Cal., 198 Pac. 7.

2.——Lien.—Where an attorney was retained by a temporary administratrix to collect moneys on deposit belonging to the estate, but collected nothing in the actions he brought, which did not come to trial, his lien against the estate, if any, attached only to papers in his possession in the actions for which he was specifically retained; there having been no services rendered by him inuring to the benefit of the estate.—In re Farmers' Loan & Trust Co., N. Y., 188 N. Y. S. 374.

3. **Bailment**—Admissibility of Evidence.—In an action to recover the value of a set of furs shipped to defendants to be repaired, which plaintiff claimed was expressed by them, by mistake, to one T., the admission of testimony of one of plaintiff's witnesses that he saw Mrs. T. wearing some furs like some he saw exhibited in the courtroom, which plaintiff had testified were similar to hers, did not justify a new trial.—Rhyne v. Munter, N. C., 107 S. E. 238.

4. **Bankruptcy**—Devise in Trust.—One to whom land was devised in trust for the heirs of his body had no title which he could mortgage or convey or which passed to his trustee in bankruptcy.—City Nat. Bank v. Slocum, U. S. C. C. A., 272 Fed. 11.

5.——Discharge.—A bankrupt's discharge was not barred on the ground that he made a false oath in his schedule, in that he denied ownership of certain lots, where a creditor, more than a year before the bankruptcy, had secured judgment against him, which became a lien upon, and for several times the value of, the lots, and within less than 20 days after the alleged false oath the same creditor got a tax title to the lots, and, more than two years before the alleged false oath, the bankrupt had executed a warranty deed to the lots, but it had never been recorded.—In re Lundberg, U. S. C. C. A., 272 Fed. 107.

6.——Mortgaged Property.—A sale of a bankrupt's mortgaged property free from liens under an order of the bankruptcy court gives the purchaser the same title as if the sale were made in any other court of equity to foreclose the mortgage or marshal the assets of an insolvent, and his title is good against the privies of the mortgagor and mortgagees, including the wife of the mortgagor, who has renounced her dower.—Gantt v. Jones, U. S. C. C. A., 272 Fed. 117.

7.——Powers of Trustee.—Under Bankruptcy Act, § 47a, subd. 2, as amended by Act June 25, 1910, § 8, and in view of sections 70a and 70e (section 9654), a trustee in bankruptcy is deemed vested with all the rights and powers of a creditor holding an unsatisfied execution, and may avoid any transfer fraudulent as to creditors which a creditor might have avoided, had bankruptcy not intervened.—Ignatius v. Farmers' State Bank, U. S. C. C. A., 272 Fed. 33.

8.——Preferential Payments.—The payment of a dividend, by the receiver of a state court appointed for an insolvent partnership in a suit by one partner for dissolution, to such creditors as presented their claims within four months prior to bankruptcy of the partnership, held to operate as a voidable preference, as against other creditors, who were without notice and did not participate, and to entitle them, on proving their claims in bankruptcy, to payment of an equal percentage thereon before further dividends were paid; for the primary purpose of the bankruptcy act is to give to all unsecured creditors the same percentage of their claims, and a court of bankruptcy should administer it broadly as a court of equity to that end.—Farnsworth v. Union Trust & Deposit Co., U. S. C. C. A., 272 Fed. 92.

9. **Banks and Banking**—Authority of Cashier.—A cashier of a bank is not, simply by virtue of his position as cashier, vested with authority to bind the bank if he agrees with one of the makers of a note to sell collateral, especially when the collateral is not salable at as high a price as agreed upon between the cashier and a maker of the note.—Hager v. President, Etc., of Hagerstown Bank, Md., 113 Atl. 730.

10.——Certified Check.—After a check is certified by a bank, at the request of the holder or payee, the defense that the check is void because the consideration is illegal is not open to the bank. The transaction is this: The bank says, The check is good; we will pay it now, if you will receive it. The holder then says, No, I will not take the money now; you may retain it for me, until the check is presented for payment. The bank replies, Very well; we will do so—thus substituting a new contract between the holder of the check and the bank.—Jones v. National Bank of North Hudson, N. J., 113 Atl. 702.

11.——Credit for Check.—A printed notice, sent by mail by bank which received check drawn on it by mail from depositor: "We beg to acknowledge receipt of your favor of 8-6. We have entered to your credit $3,567.50. All other items than those drawn on this bank are credited subject to final payment"—and the making of a deposit slip, a copy of which was inclosed with the notice, showed an intention to give the depositor absolute credit for the amount of the check.—Cohen v. First Nat. Bank of Nogales, Ariz., 198 Pac. 122.

12. **Bills and Notes**—Negotiability.—In view of Rev. St. 1919, § 790, despite section 791, notation on a note that it was given to secure the difference between $15,000 and $13,820 did not destroy its negotiability under section 788, "secure" meaning to make secure, to protect, or to free from danger, risk, or hazard, to make safe.—Morehead v. Cummins, Mo., 230 S. W. 656.

13. **Carriers of Goods**—Damages.—A rule of the railroad during the war that shipper must load cars within 24 hours had no application in an action for damages for failure to furnish a car on Tuesday, in compliance with an order for a car to be set in at a station to be coopered on Monday and loaded the day following, and agreement to do so, it appearing that the car was placed the previous Saturday and, after being coopered by plaintiff on Monday, was withdrawn on Tuesday, the day on which the shipper ordered it for loading and when he was ready to do so.—Bartlett v. Missouri Pac. R. Co., Mo., 230 S. W. 660.

14.——Switching Service.—When a cement company having its plant located five or six miles from its quarry, where it obtains its rock and shale used in the manufacture of cement, contracts with a railroad company to transport its rock and shale from the quarry to the plant, the rock and shale being loaded into the cars by the cement company's employees, the railroad company by its employees attaches its engine to said cars, connects them up, hauls the loaded cars to the cement plant, and returns the empty cars to the quarry, this constitutes a switching

service, and not a road haul, notwithstanding the railroad company may use approximately five miles of its main line of road in transporting such cars from the quarry to the plant and returning the empties to the quarry.—St. Louis-San Francisco Ry. Co. v. State, Cal., 198 Pac. 73.

15. **Carriers of Live Stock**—Act of God.—A carrier is liable for damages proximately caused by an act of God, in case its failure to use reasonable diligence to prevent or mitigate the damage contributes to the loss.—Rice v. Oregon Short Line R. Co., Idaho, 198 Pac. 161.

16. **Carriers of Passengers**—Assault.—In a minor's action for personal injuries through being shot by a deputy sheriff on being ejected from a train for non-payment of fare, evidence that the conductor caused rocks to be thrown at plaintiff while on top of a coach, and firing a shot in the air for the purpose of scaring him, held not to show an unlawful assault or wrongful exercise of authority in accomplishing the ejection.—Samaritano v. Galveston, H. & S. A. Ry. Co., Tex., 230 S. W. 1049.

17.——Negligence.—In an action against a railroad for injuries to a passenger, where a count of the complaint contained a description of the means of injury and of the physical circumstances surrounding it, together with a general averment of negligence for which defendant railroad was liable, and there were also allegations showing the relation of carrier and passenger, on injury being shown, the burden was cast on defendant railroad to acquit itself of negligence.—Tennessee, A. & G. Ry. Co. v. Rossell, Ala., 88 So. 362.

18.——Negligence.—A street car conductor was not negligent in failing to prevent passengers from crowding as they left the car, where there was no reason to expect anything unusually dangerous; the passengers not being disorderly or unruly or acting in such a manner as to call for any interference by the carrier or its agents.—Ritchie v. Boston Elevated Ry. Co., Mass., 131 N. E. 67.

19.——Negligence.—A carrier's failure to adopt reasonable expedients to avoid danger from crowds struggling to get on its cars is negligence rendering it liable for injury thus proximately caused.—Grubb v. Kansas City Rys. Co., Mo., 230 S. W. 675.

20. **Constitutional Law**—Divorce.—Laws 1917, p. 183, § 10, providing that the death of either party to a divorce action during the six months following the findings and conclusions of law shall operate automatically to grant a divorce to person to whom divorce might have been granted, had the full period expired, held not unconstitutional as an encroachment upon the judiciary in violation of Const. Art. 3.—Parsons v. Parsons, Col., 198 Pac. 156.

21. **Corporations**—Assignment of Contract.—One suing on a conttract claimed to have been assigned to him by a corporation could not recover, where there was nothing to show by whom the alleged assignment was executed that the person executing it had any authority to act for the corporation, that there was any ratification of his act by the corporation or its directors, or that there was any acquiescence in the assignment or knowledge of it by any other officer of the corporation.—Pritchard v. Uphams Corner Theatre Co., Mass., 131 N. E. 70.

22.——Exchange of Stock.—A contract whereby defendants, who exchanged certain corporate stock for stock of other corporation owned by plaintiff, agreed to return to plaintiff such other stock, on 30 days' notice of plaintiff's desire to have such stock, instead of defendant's stock, given within 60 days from date of contract, held valid as against contentions that it was unilateral and was void for want of mutuality and lack of consideration.—Fast v. Baker, Ind., 131 N. E. 57.

23.——Intrastate Transaction.—Where a Michigan corporation conducting business in Illinois purchased standing timber from the owner of land in Kentucky, held, that the transaction was not interstate, so that Ky. St. § 571, requiring the filing of statement showing the corporation's office or offices, and agent or agents within the state, was applicable.—E. C. Artman Lumber Co. v. Bogard, Ky., 230 S. W. 953.

24. **Damages**—Purchasing Power of Money.—In a personal injury action, the jury in determining the amount expended by the plaintiff for doctor's bills and medicines may consider the difference between the purchasing power of a dollar at the time plaintiff expended it and its purchasing power at the time of the trial.—Tennessee River Nav. Co. v. Woodward, Ala., 88 So. 364.

25. **Easements**—Light and Air.—Where a deed describing a lot as bounded in the rear by vacant land which was to be forever kept open for light and air created an easement, in so much of the vacant land as was reasonably necessary for the use and enjoyment of the easement, a distance of 10 feet from the dividing line between the dominant and servient estates is a reasonable distance at which structures excluding light and air may be erected unless some extraordinary circumstances are shown.—Tidd v. Fifty Associates, Mass., 131 N. E. 77.

26. **Elections**—Mark on Ballot.—Court properly held that a curved line of lighter shade connecting the ends of the two lines making the cross with which the ballot was marked in the circle of the Democratic emblem was not a distinguishing mark, where it did not appear to have been made by design, but was probably made by some nervous twitch of the hand holding the pencil.—Roberts v. Donahoe, Ind., 131 N. E. 33.

27. **Eminent Domain**—Exclusive Use.—Under Code Supp. 1913, § 2120t, authorizing an electric power company to condemn a 25-foot strip for a right of way, the company does not acquire an exclusive use of such strip, but only a necessary interest in the land to enable it to exercise its franchise.—Draker v. Iowa Electric Co., Iowa, 182 N. W. 896.

28.——Just Compensation.—Burns' Ann. St. 1914, § 934, meets the constitutional requirement as to manner of condemning property, in that it provides the procedure to be followed, reserves title to the owner until payment therefor is fully made, and meets "just compensation" at the time of notice of intended appropriation by requiring "actual value" of all property actually taken, and "actual value" as the basis of damages to the landowners' property not actually taken, but injuriously affected by such appropriation.—Schnull v. Indianapolis Union Ry. Co., Ind., 131 N. E. 51.

29. **Executors and Administrators**—Res Adjudicata.—An order of sale of a two-thirds interest in land under a petition filed by administrator to sell such interest to pay the debts of deceased, claimed by administrator to be the owner of the entire land, was not res adjudicata as between the widow of deceased and her children and their privies as to the other third, the widow's right to one-third not being in issue, and the widow and children not being adversary parties.—Mossman Yarnelle Co. v. Fee, Ind., 131 N. E. 59.

30. **Frauds, Statute of**—Contract to Make Will.—Where services have been performed in consideration of decedent's oral promises to make a will in favor of claimant against his estate, a contract unenforceable under the statute of frauds, claimant is entitled to recover the value of his services, not pursuant to the terms of the contract, but on a quantum meruit; the value of the services performed, and not the value of the property agreed to be conveyed, being the measure of damages.—Hensley v. Hilton, Ind., 131 N. E. 38.

31. **Insurance**—"Accidental Means."—Railway postal clerk, who was ruptured while lifting heavy sack of mail while engaged in his customary work, where the bag was not any heavier than any other bags which he had lifted in the same way and the pile upon which he was attempting to place it was not any higher than usual, was not entitled to recover under certificate insuring him against injuries "through external, violent, and accidental means"; the means used by him to place mail bag on pile being exactly those used on other occasions, and therefore not "accidental means," within the certificate.—Fane v. National Ass'n Railway Mail Clerks, N. Y., 188 N. Y. S. 222.

32.——Change of Employment.—Where by-laws of benesciary society gave it the right to cancel the certificate on change of employment by member if the new employment augmented the risk, and required the member to notify the society in such case, the member's failure to

give notice of change in occupation was no defense in action on certificate, where the change in occupation did not increase the hazard.—Porter v. Commonwealth Casualty Co., Pa., 113 Atl. 688.

33.——Dispute.—Under St. 1907, c. 576, § 60, prescribing a standard form of fire insurance policy, providing for a determination of the loss in case of dispute by reference to three disinterested referees, and that such reference shall be a condition precedent to any right of action, and the further provision of section 60 for appointment of the third referee by the insurance commissioner in case those chosen by the parties fail to agree, where the third referee was never chosen and no application for his appointment was ever made to the insurance commissioner, and defendant waived none of its rights, there could be no recovery.—Nadeau v. Insurance Co., Mass., 131 N. E. 69.

34.——Liability of Medical Examiner.—Where agents of a life insurance company had a physician who took out a policy appointed medical examiner for the insurer on his agreement to pay the note given for the premium advanced by such agents with funds received for examinations, such physician, who received some $485, but paid only $85 on the premium note of $258, while tenaciously holding the policy, is estopped to deny his liability on his premium note to the agents, despite partial breach on the agents' part through failure to give the physician enough examinations in the six months at the end of which the note became due to pay it, such provision having been waived by the physician's agreement to give the agents all he might make for six months more.—Dobbs v. Johnson, Tex., 230 S. W. 1035.

35. **Intoxicating Liquors**—Alaska Bone Dry Law.—The Alaska Bone Dry Law, approved February 14, 1917, was not impliedly repealed by Const. Amend. 18, or the National Prohibition Act.—Koppitz v. United States, U. S. C. C. A., 272 Fed. 96.

36.——Possession.—Since the passage and approval on January 25, 1919, of the act known as the "Weekly Bone Dry Law," it has been unlawful for any person to have in his possession or to possess in the state any spirituous, vinous, or malt liquors, or any other prohibited liquors or beverages, in any quantity whatsoever.—Lyles v. State, Ala., 88 So. 375.

37.——Possession.—Though C. S. § 3379, makes it indictable to have any quantity of intoxicating liquor in possession for the purpose of sale and makes the possession of more than one gallon prima facie evidence of the illegal purpose, it is not against the state law to have in possession liquor lawfully obtained for one's own use.—State v. Helms, N. C., 107 S. E. 228.

38.——Prima Facie Case.—In prosecution for having in possession prohibited liquor, state made out a prima facie case where witness testified that he had drank beer that the contents of the bottle in question looked like beer and foamed like beer, that it smelt and tasted like beer, and that the only difference that he had found was that it did not have the kick.—Patterson v. State, Ala., 88 So. 360.

39.——State Statute.—Act 36th Leg. 1st and 2d Called Sess. (1919), c. 78, making it unlawful to possess intoxicating liquors for other than enumerated purposes, is not unconstitutional because Const. art. 16, § 20, amended, while forbidding manufacture and sale of such liquors, does not forbid possession thereof; especially as it authorizes prohibitory laws and laws in aid thereof.—Banks v. State, Tex., 230 S. W. 994.

40. **Landlord and Tenant**—Landlord's Lien.—As a lease, stipulating for liquidated damages for default to be a lien on lessee's household goods, created a lien of no higher order than a chattel mortgage and was subject to Burns' Ann. St. 1914, §§ 8636, 8637, declaring possession shall remain in the mortgagor until sale, the landlord, in a suit to foreclose his lien, had no right of possession before final judgment foreclosing the lien, and so was not entitled to have a receiver appointed.—Cowles v. Bick, Ind., 131 N. E. 36.

41.——Reasonable Rent.—In a summary proceeding by landlord against tenant for possession of premises and for non-payment of rent, under Code Civ. Proc. § 2231, as amended by Laws 1920, c. 945, the justice may decide what is a reasonable amount of rent and that the stipulated rent is unreasonable, for, although, such statute does not delegate such power, chapter 944 does in relation to actions for rent only, and Code Civ. Proc. § 2244, as amended by Laws 1920, c. 132, provides for determination of the amount of rent in case of establishment of a defense or counterclaim in whole or in part.—Needelman v. Levine, N. Y., 188 N. Y. S. 364.

42.——Summary Proceedings.—Under Laws 1920, c. 945, summary proceeding for non-payment of rent cannot be maintained, unless the landlord alleges and proves that the rent of the premises described in the petition is no greater than the amount for which the tenant was liable for the month preceding, and hence, where the landlord's proof admittedly showed that the rent sought exceeded the rent for the previous month, the proceeding cannot be maintained, regardless of any waiver by the tenant's answer.—Spinelli v. Michelli, N. Y., 188 N. Y. S. 321.

43. **Libel and Slander**—Actionable per se.—Where defendant stated that he went on a note with plaintiff and had to pay it all and that plaintiff would not talk about repaying it and was a rascal, the words were not actionable per se, for the term "rascal," while an opprobrious expression, does not charge an offense indictable under the law, and it did not appear that the words were spoken of plaintiff concerning his business and employment; hence, in the absence of averment and proof of special damages, only nominal damages could be recovered.—Jones v. Spradlin, Ala., 88 So. 373.

44. **Licenses**—Not Recoverable.—Assuming that the statute requiring demand for the return of an illegal tax to be made within 30 days after payment of the tax did not apply to a license tax illegally imposed by a city on the operation of an automobile for hire, the tax could not be recovered back, when not paid under protest as required at common law.—Blackwell v. City of Gastonia, N. C., 107 S. E. 218.

45. **Master and Servant**—Arbitration Stipulation.—A contract between a traction company and its employees, by which it was mutually agreed that if at, or within 30 days prior to the expiration of this agreement, any controversy should arise between the traction company and its employees as to the wages to be paid after the expiration of the agreement, the matter should be referred to arbitrators, does not apply to a dispute arising during the term of the contract.—In re Division 132 of Amalgamated Ass'n of Street & Electric Ry. Employees of America, N. Y., 188 N. Y. S. 353.

46.——Course of Employment.—Fatal injuries to physician's chauffeur, while taking friends on a pleasure trip before he was to call at a designated place for the physician, did not arise out of his employment within the contract of the insurance carrier, and does not entitle his wife to compensation, though the physician stated that his chauffeur was continuously in his employ, and that he made no objection to his driving the car, so long as he appeared at the time and place ordered.—Lansing v. Hayes, N. Y., 188 N. Y. S. 329.

47. **Monopolies**—Restraint of Trade.—Contract between manufacturer and dealer giving dealer exclusive right of sale in certain territory and obligating him not to sell similar goods of any other manufacturer in such territory held in violation of the state anti-trust statutes.—Fred Miller Brewing Co. v. Coonrod, Tex., 230 S. W. 1099.

48. **Municipal Corporations**—Fire Protection.—Where a municipality owned a waterworks, the failure to furnish water for fire protection, which resulted in the destruction of property, does not expose the municipality to action, for while the municipality has the liabilities of a private owner with respect to water furnished for private use to individual citizens, its action in furnishing water for fire protection is governmental, and such is the declared rule of C. S. § 2807.—Mack v. Charlotte City Waterworks, N. C., 107 S. E. 244.

49.——Ice on Sidewalk.—Where a builder engaged in erecting a building is authorized by the city to occupy a portion of the adjacent street and

to lay a temporary walk around the obstruction, his acts done under and within the authority granted are lawful, and he is not liable to a pedestrian for injuries caused by stumbling or slipping on an accumulation of snow and ice formed by natural causes on a temporary walk constructed under such authority.—Boecher v. City of St. Paul, Minn., 182 N. W. 908.

50.——Injury by Police Officer.—Where plaintiff, alleged to have been injured by negligence of a police officer, sued on a bond given by the officer, who was required by the city to perform certain duties in the fire department in addition to his other duties, it was not incumbent on plaintiff to determine whether at the time of the accident the officer was doing more duty as a policeman than as a fireman, if he was performing any duty as a policeman.—Manwaring v. Geisler, Ky., 230 S. W. 918.

51.——Negligence.—Complaint in action by employee of city contractor against city that city and its agents were negligent "in failing to inspect the same, and in failing to give the deceased notice of the insecure, unsafe, and dangerous condition, and allowing the deceased to work and climb a pole without notice of its unsafe and dangerous condition; that the defendant had due notice of such unsafe and dangerous condition, and of the fact that work was to be done thereon by deceased and others, and that the condition of said pole rendered work thereon unsafe and dangerous," held to state a cause of action against the city for negligence.—Miller v. City of Rochester, N. Y., 188 N. Y. S. 335.

52.——Nuisance.—A municipal corporation may be enjoined from maintaining and operating a sewage disposal plant or tank which is too small to care for the sewage flowing into it, thereby polluting a stream, where the structure can be so enlarged or added to as to stop the continuance of the nuisance; for in operating a sewer a city exercises a corporate power, as distinguished from a governmental function.—City of Pittsburg v. Smith, Tex., 230 S. W. 1113.

53.——Zoning Ordinance.—A village zoning ordinance is invalid under P. L. 1920, p. 455, granting authority to pass such ordinances, where it does not apply to all persons alike throughout the zone, but provides for special permits to be granted by the board of trustees after a hearing.—Village of South Orange v. Heller, N. J., 113 Atl. 697.

54. **Railroads**—Donation of Right of Way.—Where plaintiff desired to have defendant's railway located near his premises and clearly understood that he was being solicited to grant a right of way along the street in front of his property without compensation, a statement of defendant's agent, that other landowners three miles or more distant from plaintiff's place and not owning land on the same street, had agreed to donate a right of way, was not such a material representation of an existing fact as could be made the basis of the rescission of plaintiff's contract, even if false.—Smith v. Waterloo, C. F. & N. Ry. Co., Iowa, 182 N. W. 890.

55. **Sales**—Law of Domicile.—The domicile of the owner is not always controlling as to the law which governs a contract for the sale of personal property, but such sale may, like all sales of land, be governed by the law of the place where the property is situated.—Gaston, Williams & Wigmore of Canada v. Warner, U. S. C. C. A., 272 Fed. 56.

56.——Measure of Damages.—In case of a sale calling for delivery of the goods in New York City, where payment was to be made on presentation to plaintiff buyer of a sight draft with bill of lading attached, after exercise of the buyer's privilege of examining the goods on arrival, the value of the contract to plaintiff buyer is to be fixed by the market price in New York of the goods deliverable there, and on breach of the contract by defendant seller by its total failure to deliver the damage sustained by plaintiff buyer was the difference between the purchase price as fixed by the contract plus the freight charge to New York and the market price in New York City at the time when they were deliverable, despite a provision of the contract fixing the price f. o. b. San Francisco.—Standard Casing Co. v. California Casing Co., N. Y., 188 N. Y. S. 358.

57. **Ships and Shipping**—Breach of Warranty.—In a suit in rem against a vessel under charter for failure to deliver cargo, which was lost by the sinking of an unseaworthy barge hired by the charterer for use in discharging the ship, the charterer held entitled to bring in both the broker from whom it hired the barge and its undisclosed owner, for whom the broker acted as agent, and to a joint and several decree against both for breach of the implied warranty of seaworthiness of the barge; for the doctrine of election is not applicable, as the wrong sounds in tort as much as in contract.—The Jungshoved, U. S. D. C., 272 Fed. 122.

58. **Specific Performance**—Implied Condition.—The defendant leased to the plaintiff for 10 years a large tract of land in which there was a partially developed stone quarry, and agreed to convey to him one-half of the land at the expiration of the lease, it being then in force. The plaintiff did not agree to develop a quarry and expressly exempted himself from liability for a failure to do so. The parties contemplated, as a vital part of the consideration for a grant of one-half the lands, that the plaintiff would develop or make a genuine effort to develop a quarry, and such development or effort to develop was an implied condition of the agreement to convey. There was no such development or effort to develop and the court rightly denied specific performance.—Reynolds v. Pike-Horning Granite Co., Minn., 182 N. W. 906.

59.——Signature of Wife.—A bill by the purchaser against the vendor and his wife for specific performance of the contract of the vendor to sell and convey his land, not signed or acknowledged by his wife, but with whom she joined in an undelivered deed therefor, is good on demurrer, if not appearing from the bill that defendants had refused to execute the contract by delivery of the deed because of the wife's revocation of her undelivered deed and her refusal to join with her husband in the delivery thereof, such matter, if good, being matter of defense not presented by demurrer to the bill.—Walter v. De Moss, W. Va., 107.

60. **Street Railways**—Increase in Fare.—Where a railway company's track is unsafe, imperiling life and limb of passengers, and its condition makes riding physically uncomfortable, and trains are not run according to schedule, and the equipment is insufficient, such defects diminish the company's revenue, and its excuse for allowing such a situation to exist after having been ordered by the Board of Public Utilities to remedy such defects that it has no money with which to do so is no reason why the railway should be equipped and operated at public expense.—New Jersey Central Traction Co. v. Board of Public Utility Com'rs, N. J., 113 Atl. 692.

61.——Rate Base.—In fixing the present value of a street railway company for the purpose of a rate base, the reproduction method should be applied reasonably, and as applied to the inflated values which have arisen since and because of the war it must appear that the level of prices is not transitory.—Galveston Electric Co. v. City of Galveston, U. S. D. C., 272 Fed. 147.

62. **Taxation**—"Gain Derived."—Where, in year 1919, when Income Tax Law went into effect, owner sold securities for less than the price at which he had purchased them prior to that year, but in excess of their market value on January 1st of that year, the state comptroller improperly included in the gross income of the seller, as defined by section 359, the difference between the market value on January 1, 1919 ,and their selling price, since the "gain derived," spoken of in section 353, means such gain as is described and referred to in section 359.—People v. Wendell, N. Y., 188 N. Y. S. 301.

63.——Insane Asylums.—St. 1914, c. 518, § 1, providing that real and personal property of charitable corporations, occupied as an insane asylum, etc., shall not be exempt from taxation unless at least one-fourth of such property is used for the treatment of indigent insane persons, etc., as resident patients without charge, is not invalid as creating an irrational, oppressive, arbitrary, or unequal classification, though such classification in fact includes only two corporations.—Massachusetts General Hospital v. Inhabitants of Belmont, Mass., 131 N. E. 72.